85-859

Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

BETTY LYNN SULLIVAN, Petitioner
V.
STATE OF TEXAS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIRST SUPREME JUDICIAL DISTRICT

CAROLYN C. GARCIA
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2038 LEXINGTON STREET
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713/524-5007

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QUESTION PRESENTED

1. Whether, Petitioner, an active supporter of the Revolutionary Communist Party, was denied her constitutional protected right to effective assistance of counsel and whether consistent with that premise whether effective counsel includes the right to question potential venirepersons on the feelings surrounding Communism, the Communist Party, the direct object of the charge of the felony criminal mischief charge, to-wit: the spray painting of the Exxon Building in Houston, Texas with the political charged speech, "RED, WHITE & BLUE - WE SPIT ON YOU! FLY THE RED FLAG MAY 1ST!"

Restated differently, the trial court's restricted voir dire procedures worked to deprive Petitioner a fair proceeding.

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BETTY LYNN SULLIVAN, by and through her counsel of record, ANTHONY P. GRIFFIN, petitions for a Writ of Certiorari to review the order of the First Supreme Judicial District Court of Appeals[1] affirming the criminal conviction of Petitioner for the offense of criminal mischief.

---

[1]The Court of Appeals for purposes of this appeal, and its opinion, constitutes the State Court of final Appellate jurisdiction in light of the highest Appellate State Court, Texas Court of Criminal Appeals refusing to grant Appellant's Petition for Discretionary Review (See Texas Code of Criminal Procedure, Article 44.33, Rules 302, 304, Discretionary Review in General).

OPINIONS BELOW

The Court of Appeals opinion (App. A, infra) is reported at 678 S.W.2d 162 (Tex. App.-Houston [1st Dist.]1984). The order of the Texas Court of Criminal Appeals refusing the Petition for Discretionary Review (App. C, infra) and denying the Motion For Rehearing (App. D, infra) effectively makes the Texas Court of Appeals the final appellate court for Appellant's appeal process.

JURISDICTION

For purposes of this request for Certiorari, the Texas Court of Criminal Appeals denied the Petition for Discretionary Review (See Appendix C) on May 8, 1985 and the Appellant's Motion for Rehearing was denied July 10, 1985 (See Appendix D). This Writ of Certiorari is due for filing September 9, 1985.

Jurisdiction of this Court is invoked under 28 U.S.C. §1253(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In cases involving complaints about the fullness and fairness of the jury selection process (voir dire), the applicable constitutional provisions are the Sixth Amendment of the United States Constitution and how that amendment is

applied to the States by means of the Fourteenth Amendment of the United States Constitution (concepts of due process).

The voir dire process was conducted under Texas Code of Criminal Procedure, art. 35.14, 35.15 and 35.17 (1973). (See Appendix A, infra).

STATEMENT

On the morning of May 1, 1981, appellant, an active supporter of the Revolutionary Communist Party, was arrested while attending a demonstration celebrating May Day. (R.O.A. at Vol. 4, at 231 and 283). She subsequently learned that she was being arrested on a felony criminal mischief (V.T.C.A., Penal Code §28.03) for spray painting the slogan, "RED, WHITE & BLUE--WE SPIT ON YOU! FLY THE RED FLAG MAY 1st!" on the wall of the Exxon building in downtown Houston in the early morning hours of April 28, 1981, resulting in alleged damage of over $200 and less than $10,000. (Tr. at 5).

The subsequent investigation of the incident was assigned to Houston Police Department Criminal Intelligence Division officers Morris Quast and A. L. Blair, who had for a number of years subjected supporters of the Revolutionary Communist Party, including appellant, to

physical and photographic surveillance, arrest and interrogation. (R.O.A. at Vol. 4, at 223-230).

The Party's activities, nationally and in Houston, have been the subject of extensive public attention and controversy since at least 1977, particularly those in support of a 1978 violent demonstration against police brutality in Moody Park, and the annual celebration of May 1st as "International Worker's Day" by displaying red flags. Some 51 recent local news articles were introduced in support of appellant's Motion for Individual Voir Dire. As a result of her participation in the Party's public activities attended by Officer Quast, he frequently addressed her by her first name, "Betty" (R.O.A. at Vol. 4 at 228).

The case was tried to a jury. Appellant denied that she knew anything about the offense until her arrest. (R.O.A. at Vol. 4, at 221-222, and 230). The only evidence connecting her with the offense was the testimony of a taxi driver, Bob Price, who was permitted over objection to identify her as the building painter and the person whose photograph he selected from a display (which appellant moved to supress as impermissibly

suggestive) arranged by Officer Quast. (R.O.A. at Vol. 4, at 3, lines 14 25; 4-7, lines 1-25 and 8, lines -10).

During trial, petitioner's counsel was restricted in their voir dire examination of 40 panel members to 45 minutes, and were not permitted to question the jury about the effect the slogan "RED, WHITE & BLUE--WE SPIT ON YOU! FLY THE RED FLAG MAY DAY" would have on their deliberations, nor to question the venire members as to 30 specific questions concerning appellant's status as a known supporter of the RCP, the Red Flag, patriotism, communism and military service.

In the end, defendant was convicted and, the jury assessed a punishment of two years confinement in the Texas Department of Corrections. (Tr. at 203).

Appellant's conviction was affirmed by a divided panel of the First Court of Appeals on August 30, 1984. Chief Justice Frank G. Evans dissented for the reason that the trial court exceeded the bounds of its discretion when it refused to permit appellant's counsel to examine prospective jurors about the content of the painted message, thereby denying appellant's right to effective assistance of counsel in the intelligent

exercise of peremptory challenges.

Appellant's Motion for Rehearing was overruled on September 20, 1984, per curiam, with Chief Justice Evans dissenting. Subsequently, appellants Petition for Discretionary Review was received in the Court of Criminal Appeals on October 26, 1984, the Petition was denied on May 8, 1985 and the Appellant's Motion for Rehearing was denied on July 10, 1985.

REASON FOR GRANTING THE PETITION

Constitutional dictates require that counsel representing the criminally accused be able to exercise a full examination of potential venirepersons, particularly on issues of political import and emotion such as communism, the communist party, and the Red Flag.

Chief Justice Evans of the Texas Court of Appeals reiterated the Constitutional deprivation in his dissenting opinion at 678 S.W.2d 162, at 170, 171 (Tex. Civ. App. 1984). The Chief Justice provided in part...

"I agree with the majority that the tiral court did not abuse its discretion in controlling the time and general scope of the voir dire examination. However, I believe the trial court did

exceed the bounds of its discretion when it refused to permit appellant's counsel to examine prospective jurors about the content of the painted message.

The record shows that the appellant's counsel made an adequate explanation to the trial court of the purpose of his line of questioning, and that notwithstanding such explanation, the trial court, on two separate occasions, prevented him from asking the jury panel whether they would be improperly influenced by the contents of the painted message...

The appellant never contested the fact that the message was painted on the building, and as the State pointed out in its argument, the content of the message had nothing whatsoever to do with the offense charged. Thus, the only question concerning the text of the message was whether it was of such a nature as to improperly prejudice the prospective juro s against the accused." (Sullivan, id. at 170 and 171).

This Court has generally stated that trial court discretion over voir dire is limited by the "essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054

(1931). Guided by this basic concern for "essential fairness", this court in its earliest analysis of the issue suggested an open-ended principle which appears to have reasoned that if challenges for cause and peremptory challenges are necessary to ensure an impartial jury, then freedom to question must also be necessary to ensure the proper use of those challenges. See Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950); Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

In Dennis, supra, 339 U.S. at 168, 171, 70, S.Ct. at 523, 525, the Supreme Court considered a challenge to government employees serving as jurors in the trial of Communists. While the Court concluded that government service was not per se a ground for exclusion, it indicated that actual bias could always be investigated on voir dire. Justice Minton wrote: "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact....Preservation of the opportunity to prove actual bias is a guarantee of defendants right to an impartial jury." Id. In Swain v. Alabama, supra, 380 U.S. at 218-219, 855 Ct. at 834-35, the Court

reviewed the use of peremptory challenges and the right to obtain information for their exercise. A broad right of access to information was suggested: "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories...." Id.

Recently this Court in Ham v. South Carolina, 409 U.S. 525, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), required a nexus exist between the prejudice feared and the issues in the case. In Ham, this court was to reverse the marijuana conviction of a defendant who contended that he was "framed" by law enforcement officers "out to get him" because he was well known for his political activities as a black civil rights worker. Although issues of racial prejudice seemed likely to be involved in the trial, the trial judge denied a defense request to ask prospective jurors certain questions about possible prejudices. Accordingly this failure to allow questioning into possible racial prejudice constituted reversible error. Justice Rehnquist's majority opinion concluded that, given the state's statutory framework establishing challenge for cause, the failure

to allow inquiry into racial prejudice violated the Fourteenth Amendment due process requirement of fairness and its prohibition against invidious discrimination on the basis of race. Ham, supra, 409 U.S. at 526-27, 93 S.Ct. at 850-51.

Although the particular facts and circumstances of Ham, id., fell within the confines of the general rule stated above, these same facts and circumstances, created the opportunity to formulate a more concrete and workable rule for testing trial court discretion. In interpreting Ham, the Court in Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), instead of focusing on the likelihood that a prospective juror was prejudiced, focused on the likelihood that the factors at trial would "intensify" any prejudice that was held by jurors and thus "distort" or "infect" the trial. Ristaino, id.; see generally, Gaba, Voir Dire of Jurors: The Constitutional Limits of the Right of Inquiry into Prejudice, 48 Colo L. Rev. 524 (1977). Therefore, the nexus between Ham's political activism and the nature of his defense at trial was controlling.

With this view, the Court in Ristaino stated that Ham's civil rights

activity, along with his defense of police frame up, demonstrated that racial issues were "inextricably bound up with the conduct of the trial," and "were likely to intensify any prejudice that individual members of the jury might harbor." Ristaino supra. In such circumstances the Supreme Court in Ham and Ristaino deemed a voir dire that included questioning specifically directed to racial prejudice as necessary for a trial judge to meet the constitutional requirement of an impartial jury. Ristaino, supra, 424 U.S. at 597, 96 S.Ct. at 102.

The facts and circumstances of appellant's case specifically comport with those surrounding the application of the "nexus" test interpreted by Ristaino to have been announced in Ha.. Like Ham, who was a black civil rights activist, petitioner is a political activist specifically engaged as an active supporter of the Revolutionary Communist Party. Moreover, both Ham and petitioner were tried under criminal charges, and contended on defense that their arrest and prosecution was a political "frame up" initiated by law enforcement officials. Petitioner specifically contended that her arrest and prosecution resulted from the fortui-

tous circumstances that (1) she was an active and public supporter of the Revolutionary Communist Party; (2) the painted message was anti-patriotic and clearly associated with Communism and its universal symbol, the red flag; and (3) her public support of the party was known to the State's police witnesses by their dealings with petitioner prior to the discovery of the slogan on the xxon Building. Moreover, petitioner insisted that she was mistakenly identified as a result of a photo display which she, the petitioner, was to contend was impermissibly suggestive.

Consistent with the particular facts surrounding the nexus requirement of Ham, petitioner included as one of her theories of defense at trial that the State's witnesses were motivated by their prejudicial disagreement with the content of the political message painted on the side of the Exxon Building. The trial court judge was very much aware of this fact since appellant's counsel at voir dire, in attempting to explain the necessity for the admission of such questioning, stated:

> "Your Honor, if I could, I think it's necessary for us to briefly ask

the jury about their attitude as to what it was that was painted on the side of the Exxon Building. We have every reason to believe that. As a matter of fact, that is one of the theories of our case, Your Honor -- that The State's witnesses are biased or prejudiced; that their testimony against our client will not be truthful; that their motivation for testifying untruthfully will be that they disagree with the content of the political message on the side of the building and they also disagree with the client's political feelings and philosophy." R.O.A. at Vol. 1, at 89, lines 1-25 and 89, lines 1-10).

Accordingly, this restriction, and therefore, unconstitutional abuse of trial court discretion constitutes reversible error. Ham, supra, 409 U.S. at 529, 93 S.Ct. at 851.

In addition to the above analysis of "nexus" involving theories of defense, the facts and circumstances of petitioner's case demonstrate an even closer nexus between the prejudice feared and the issues of the case. Unlike the criminal charges against Ham (possession of marijuana), the charges for criminal

mischief against petitioner involve an expression of the very prejudice feared by petitioner to bias the jury. Therefore, the prejudice feared would be so "inextricably bound up with the conduct of the trial" that it would even be a part of the evidence presented at trial. The trial court judge was aware of this fact, and indeed at trial not only a photograph of the slogan was to be presented for authentification,[2] but in fact on several occasions the words of the slogan were allowed to be repeated in the course of the trial proceeding. (Tr. at Vol. VII, at State's Exhibits 1-5).

---

[2]At one point in the course of voir dire, petitioner's counsel reminded the trial court judge of this fact by stating:

"Your Honor, it's my understanding, furthermore, that the State did call Officer Blair as a witness to authenticate a photograph of the slogan, which will be introduced into evidence, and that the photograph will show that the slogan painted on the side of the Exxon Build ng was, "RED, WHITE & BLUE--WE SPIT ON YOU! FLY THE RED FLAG MAY 1." (R.O.A. at Vol. 1, at 91, lines 3-17).

These facts and circumstances of petitioner's case demonstrate an even closer nexus relationship than that described in Ham, and thus affirms the above-stated conclusion that the trial court judge's actions were an abuse of his discretion and a violation of petitioner's constitutional right of trial by an impartial jury.

Absent such circumstances as described above mandating a constitutional inquiry, the Supreme Court held in Ristaino that "the wiser course generally is to propound questions designed to identify...prejudice if requested by the defendant." Ristaino, supra, 424 U.S. at 597, 96 S.Ct. at 1022 n.9; see Rosalez-Lopez v. United States, 451 U.S. 182, 190, 101 S.Ct. 1629, 1635, 68 L.Ed.2d 22 (1981). Furthermore, according the Justice White, in Rosalez-Lopez, supra, 451 U.S. at 191, 101 S.Ct. at 1635, failure to honor this request by the accused will constitute reversible error where the circumstances of the case indicate that there was a reasonable possibility that prejudice might have influenced the jury.

In applying these general principles of the Federal circuit courts to

appellant's case, the circumstances surrounding her case demanded more specific inquiry into prejudice. Besides the general harsh feelings harbored against Communists by many Americans, the Revolutionary Communist Party, particularly in Houston in recent years, has been the object of much public attention, controversy and animosity. Particularly demonstrative, are the incidents surrounding the Moody Park demonstrations against police brutality in 1978, the subsequent trials of the "Moody Park Three," and the continuing debate over parading in downtown Houston.[3]

More specifically, the printed message of defacement of the American flag could also presumably incite a prejudicial response by jurors. There is no doubt that attitudes of the average American Citizen towards the flag are so strongly held that they "touch the heart of the

---

[3]Fifty-one recent newspaper articles appearing in the Houston Post and the Houston Chronicle concerning the Revolutionary Communist Party were introduced in support of appellant's Motion for Individual Voir Dire. (Tr. at - Exhibits 1 and 2).

existing order." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943). Furthermore, for "the great majority of (citizens), the flag is a symbol of patriotism, pride in the history of our country, and of the service, sacrifice and valor of the millions of Americans." Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed. 842 (1974).

Given these circumstances of presumed bias, the trial court, in Petitioner's case, particularly in light of the principles set forth in this Court's previous decision, was under the duty to inquire further into the potential prejudice of the prospective jurors.

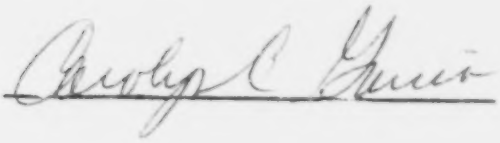
CONCLUSION

As Chief Justice Evans was to write below:..."In my opinion, the appellant was not permitted to examine the jury panel on a matter which would have enabled him to intelligently exercise his peremptory challenges, and the denial of that right requires that we reverse the trial court's judgment and remand the cause for a new trial." (Sullivan v. State, supra at 648 S.W.2d at 172).

Requested relief is prayed for from this Honorable Court. The Petitioner's Request for Certiorari should be

granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this the 9th day of September, 1985, a true and correct copy of the foregoing Petition for Writ of Certiorari was forwarded to opposing counsel by mailing same certified mail, return receipt requested, postage prepaid, to:

State Prosecuting Attorney
State Prosecuting Office
P. O. Box 12405
Austin, Texas 78711

CERTIFIED MAIL
RRR NO. P 658784134

Carolyn C. Garcia

APPENDIX A

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *** and to have the Assistance of Counsel for his defence.

2. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law ***

3. Tex. Penal Code Ann. Sec. 28.03(1974) provides in pertinent part as follows:

> Sec. 28.03. Criminal Mischief
>
> (a) A person commits an offense if, without the effective consent of the owner:

(1) he intentionally or knowingly damages or destroys the tangible property of the owner

***

(b) An offense under this section is:

***

(4) a felony of the third degree if:

(A) the amount of pecuniary loss is $200 or more but less than $10,000 ***

4. Tex. Code Crim.Pro.Ann. art. 35.14 provides in pertinent part as follows:

Art. 35.14. A peremptory challenge

A peremptory challenge is made to a juror without assigning any reason therefor.

5. Tex. Code Crim Pro.Ann. art. 35.15 (1973) provided in pertinent part as follows:

Art. 35.15. Number of challenges

***

(b) In non-capital felony cases, the State and defendant shall each be entitled to ten peremptory challenges. ***

6. Tex. Code Crim.Pro.Ann. art. 35.17 (1973) provided in pertinent part:

Art. 35.17. Voir dire examination

1. When the court in its discretion so directs, except as provided in Section 2 [capital felony cases], the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

***

APPENDIX B

BETTY LYNN SULLIVAN, Appellant,

v.

THE STATE OF TEXAS, Appellee.

No. 01-82-0118-CR.

COURT OF APPEALS OF TEXAS,

Houston (1st Dist.).

Aug. 30, 1984.

Rehearing Denied Sept. 20, 1984.

Defendant was convicted in the 185th District Court, Harris County, George Walker, J., of felony criminal mischief, and she appealed. The Court of Appeals, Dugan, J., held that: (1) defendant was afforded reasonable opportunity to test partiality o prospective jurors and was not deprived of her right to make intelligent use of her peremptory strikes at voir dire; (2) witness' prior observation of defendant was sufficient to serve as independent origin for in-court identification; (3) testimony f building's technical supervisor that it cost $549 to remove political slogan that defendant had allegedly painted on the building was sufficient to establish that damage to the building exceeded $200, and (4) defendant was not entitled to admonition of jury based upon prosecutor's alleged

misconduct in asking defendant about prior offenses.

Affirmed.

Evans, C.J., filed dissenting opinion.

1. Criminal Law - 1115(2)

Defendant's failure to secure recordation and transcription of entire voir dire examination did not preclude review of any error allegedly occurring during the voir dire where only small portion of court's preliminary questioning, if any, was not recorded, and prosecution and defense questions were shown in their entirety. Vernon's Ann.Texas C.C.P.art. 40.09, subd.

2. Jury - 131(3)

Defendant was not required to show that any juror seated on panel was one against whom challenge for cause existed in order to claim she was forced to accept unnamed objectionable jurors without being able to intelligently exercise peremptory challenges; defendant was entitled to voir dire to select intelligently those jurors she wished to strike peremptorily.

3. Jury - 131(3)

Showing that juror seated on

panel was one against whom challenge for cause existed is not required to claim error in court's refusal of questions sought to permit intelligent exercise of peremptory challenges; deprivation of that right is only harm that need be shown.

4. Jury - 131(3)

How jurors would have answered questions pertaining to possible bias was immaterial with respect to defendant's claim that she was forced to accept unnamed objectionable jurors without being permitted to intelligently exercise her peremptory challenges.

5. Jury - 131(4)

Areas which defense counsel may explore during voir dire examination are broad and may not be unnecessarily limited; nevertheless, conduct of voir dire examination rests within sound discretion of trial court, and only abuse of discretion will call for reversal.

6. Jury - 131(4)

Trial court may impose reasonable restrictions on exercise of voir dire examination, including reasonable time limitations; within those limits, defendant may pose questions to panel and examine individual prospective jurors upon any proper area of inquiry.

7. Jury - 131(3)

Amount of time allocated defendant for voir dire is not in and of itself conclusive of issue of whether defendant was allowed to select intelligently those jurors she wished to strike peremptorily.

8. Jury - 131(4)

In voir dire of jury, trial court was not obliged to permit repetition in slightly different language questions that had already been answered, after it had determined that none of panel members were acquainted with defendant or had knowledge of the case.

9. Jury - 131(4)

At voir dire, it is not error to deny further examination into area where there has been no initial response.

10. Jury - 131(4)

Defendant who was charged with felony criminal mischief after she allegedly wrote political slogan on building's wall was afforded reasonable opportunity to test partiality of prospective jurors and was not deprived of her right to make intelligent use of her peremptory strikes at voir dire where defense counsel had asked prospective

jurors whether they would be prejudiced against a defendant who was a Communist, and prospective jurors answered negatively, and questions that defense counsel would have asked at voir dire if he had been given more time were substantially similar to those he had already asked, although defense counsel was given only 48 minutes to conduct the examination.

11. Criminal Law - 339.9(2)

Witness' prior observation of defendant was sufficient to serve as independent origin for in-court identification where he had restrained her for at most four minutes after watching her writing on a building with a can of spray paint.

12. Criminal Law - 693

Complaints of defendant charged with felony criminal mischief about manner of proof of monetary loss to building on which she had allegedly painted a policial slogan were waived by her failure to object at time the testimony regarding value of repairing damages to building was introduced. V.T.C.A., Penal Code §28.03(b)(4)(A).

13. Malicious Mischief - 9

Testimony of building's

technical supervisor that it cost $549 to remove political slogan that defendant had allegedly painted on the building was sufficient to establish that damage to the building exceeded $200 under felony criminal mischief statute. V.T.C.A., Penal Code §28.03(b)(4)(A).

14. Criminal Law - 1036.1(9)

Defendant's complaint that trial court erred in excluding testimony of two witnesses regarding her reputation for truth and veracity at punishment phase of trial was not properly before the Court of Appeals for review where defendant did not ask to retire jury so trial court could hear proffered testimony as provided for by statute. Vernon's Ann.Texas C.C.P.art. 40.09,subd. 6(d)(1).

15. Indictment and Information - 10.2(2)

Evidence that police officer's sworn statement used as basis for arrest warrant w s inconsistent with his testimony at trial was insufficient to establish that material, perjured testimony was used to return indictment in light of evidence that officer had not testified before grand jury.

16. Criminal Law - 698(1)

Failure to object waives any

error in admission of evidence tending to show extraneous offense.

17. Criminal Law - 1036.1(2)

Timely objection to admission of evidence must be raised at first opportunity; failure to object timely waives any error in admission of evidence and presents nothing for review.

18. Criminal Law - 728(3)

Defendant was not entitled to admonition of jury based upon prosecutor's alleged misconduct in asking defendant about prior offenses where defendant made no objection t prosecutor's question about extraneous offenses until after prosecutor approached bench and court had jury removed.

---

19. Criminal Law - 1045

Failure to secure adverse ruling on motion for mistrial based upon prosecutor's questions about defendant's extraneous offenses preserved nothing for review.

Glen Van Slyke, Bobby H. Caldwell, Houston, for Appellant.

Ray Elvin Speece, Houston, for appellee.

Before EVANS, C.J., and BASS and DUGGAN, J.J.

OPINION

DUGGAN, Justice.

A jury found appellant guilty of felony criminal mischief and assessed her punishment at two years confinement. An active supporter of the Revoluntionary Communist Party, appellant allegedly spray-painted upon a wall of the xxon Building in Houston the following message.

Fly the Red Flag

Red, White and Blue -- We Spit on You!

May 1st, 1982

Six grounds of error are presented.

Appellant's first ground of error urges that the trial court erred by restricting her jury voir dire so severly that her attorneys were unable to intelligently exercise peremptory challenges. She argues that the court prevented inquiry as to the effect on potential jurors of anticipated inflammatory evidence relating to her political beliefs and activities.

The State urges that appellant's grou d of error is multifarious in complaining of the court's limitation on both the terms and the scope of voir dire. Nevertheless, we

are able to understand her contentions as relating to the single question of whether appellant was denied the right to the effective exercise of her peremptory strikes, and we will address the various sub-issues grouped under this heading. Tex.CodeCrim.P.Ann. art. 40.09(9) (Vernon Supp.1982-1983).

The court reporter's notes indicate that voir dire was already in progress when the recording began, at which point the trial judge was asking whether any of the verniremen were acquainted with the appellant, her attorneys, or the State's attorneys. There was no response. The judge read the indictment and asked if any of the panel had knowledge of the case. Again, no prospective juror responded. He then informed the panel of the defendant's right not to testify and discussed the jury's role as factfinder.

Appellant's counsel's own voir voir, while somewhat repetitive of the State's, focused upon the presumption of innocence and the difference between a preponderance of the evidence and proof beyond a reasonable doubt. Counsel inquired of the panel as a whole whether anyone was acquainted with four of the

prosecution witnesses seated in the courtroom, and received no response. A large portion of his voir dire was devoted to questioning of individuals who had experience, or had relatives or friends with experience, in law enforcement.

Appellant's counsel attempted twice to inform the panel of the content of the message spray-painted on the building in order to ascertain whether any juror would be influenced by its political implications. The court sustained the State's objections each time, saying "I don't want this message given to the jury." Appellant's counsel then sought to determi e whether prospective testimony by a peace officer about prior dealing with appellant in connection with her activities as a supporter of the Revoluntionary Communist Party would affect anyone's ability to weigh the evidence. Again, the State's objection was sustained, and counsel was warned that he had one minute remaining.

The court then permitted, over the State's objection, the following question:

> Is there anyone on the jury who feels that you might have some difficulty sitting in judgment on the case of a woman who is accused of this instance of criminal mischief who is a supporter of the Revoluntary Communist Party?

No veniremen, including three who were asked individually, answered that such political activity would influence their deliberations. Appellant's counsel next asked whether appellant's belief in communism and her opposition t capitalism would affect her credibility before the jury if she were to testify in her own behalf. No veniremen responded.

The court informed defense counsel that his time was "up." Counsel thereafter dictated a bill of exceptions consisting of thirty additional questions he would have asked members of the panel as a whole and individuals, if necessary, (1) to determine bias or prejudice on account of appellant's political beliefs or activities, which he stated he anticipated would be part of the evidence presented by the State, and (2) to determine whether jurors had "heard anything either by hearsay or otherwise and formed a conclusion as to the guilt

or innocence of the defendant." The court qualified the bill by stating that defense counsel made no objection when each side was advised, before voir dire began, that it had 45 minutes, and that the defense was given three additional minutes.

[1] The State asserts that appellant's failure to secu e the recordation and transcription of the entire voir dire examination precludes review of any error allegedly occurring during the voir dire. We disagree. As noted above, only a small portion of the court's preliminary questioning, if any, was not recorded, and prosecution and defense questions were shown in their entirety. Burkett v. State, 516 S.W.2d 147 (Tex.Crim.App.1974), cited by the State, is not controlling since the record there included only that portion of the jury panel voir dire in which "a question was asked, objection made, and the asking of the question denied." Id. at 160. The Burkett court was thus unable to ascertain whether the questions refused were anything more than a restatement of what had been already asked: no such handicap exists here.

[2-4] Finally, the State

insists the appellant may not claim she was forced to accept unnamed objectionable jurors without showing that any juror seated on the panel was one against whom a challenge for cause existed. We disagree. Such a showing is not required to claim error in the court's refusal of questions sought to permit the intelligent exercise of peremptory challenges. Burkett, at 149. Burns v. State, 556 S.W.2d 270 (Tex.Crim.App.), cert. denied, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977), cited as support, is inapposite. Appellant was entitled to voir dire to select intelligently those jurors she wished to strike peremptorily. Deprivation of that right is the only harm that need be shown. Abron v. State, 523 S.W.2d 405, 409 (Tex.Crim.App.1975). It is immaterial how the jurors would have answered the questions. Mathis v. State, 322 S.W.2d 629, 631 (Tex.Crim.App.1959).

On the merits of the issue, appellant first urges that the questions propounded, but not permitted to be answered, were proper to determine juror's attitudes toward the message painted by appellant and her prior political activities.

[5,6] The areas which defense counsel may explore during the voir dire examination are broad and may not be unnecessarily limited. Hughes v. State, 562 S.W.2d 857, 862 (Tex.Crim.App.), cert. denied, 439 U.S. 903, 99 S.Ct. 268, 58 L.Ed.2d 250 (1978): Nevertheless, the conduct of voir dire examination rests within the sound discretion of the trial court, and only abuse of discretion will call for reversal. Clark v. State, 608 S.W.2d 667, 669 (Tex.Crim.App.1980); Phillips v. State, 511 S.W.2d 22, 27 (Tex.Crim.App. 1974). The trial court may therefore impose reasonable restrictions on the exercise of voir dire examination, including reasonable time limitations. Clark. Within those limits, the defendant may pose questions to the panel and examine individual prospective jurors upon any proper area of inquiry. Florio v. State, 568 S.W.2d 132, 133 (Tex.Crim.App. 1978).

Although juror attitudes toward appellant's political beliefs and conduct are a proper area of inquiry, appellant has not demonstrated reversible error. The two questions appellant here sought to have prospective jurors answer were essentially restatements of the

question already asked, that is, whether appellant's support of the Revoluntionary Communist Party would influence the juror's deliberations. Appellant has failed to show she has been deprived of any valuable right. Burkett, at 149; Grizzell v. State, 298 S.W.2d 816, 822 (Tex.Crim.App. 1956); Pendergrass v. State, 48 S.W.2d 997 (Tex.Crim.App.1932).

[7] As to the Court's time restrictions upon voir dire, the amount of time allotted a defendant for voir dire is not in and of itself conclusive of the issue. Clark, supra, (distinguishing De La Rosa v. State, 414 S.W.2d 668 (Tex.Crim.App.1967), from Barrett v. State, 516 S.W.2d 181 (Tex.Crim.App.1974), cert. denied, 420 U.S. 938, 95 S.Ct. 1148, 43 L.Ed.2d 414 (1975)). Clark found abuse of discretion in arbitrarily limiting defendant's voir dire examination since the questions that were asked were relevant, material, and necessary to aid the defendant in intelligently exercising his peremptory challenges, and in refusing to allow defense counsel to ask whether jurors had formed an opinion as to the defendant's guilt or innocence. Whitaker v. State, 653 S.W.2d 781 (Tex.Crim.App. 1983), held

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that a trial court's limitation of a defendant's jury voir dire to fifty minutes was not unreasonable and the defendant had shown no harm.

In the instant case, defense counsel was given 48 minutes to voir dire the panel. According to his bill of exceptions, the additional questions counsel would have asked, if permitted more time, included inquires into prior military service; membership in veterans, patriotic or anti-communist organizations; government employment; pretrial publicity about the offense, the accused, or the Revoluntionary Communist Party; the existence of any opinion as to the accused's guilt or innocence; and the credibility of a witness who is a supporter of a communist group.

[8,9] It is apparent that defense counsel spent an inordinate amount of time expounding on general principles of law and haggling with veniremen over the presumption of innocence. While some of his proposed questions would have been proper, others would not. During his voir dire, appellant's counsel questioned eleven veniremen, four of whom became jurors, one of whom was excused for cause, and

four of whom he struck peremptorily. Having already determined that none of the panel members were acquainted with appellant or had knowledge of the case, the trial court was not obliged to permit repetition in slightly different language of questions that had already been answered. Sanne v. State, 609 S.W.2d 762 (Tex.Crim.App.1980), cert. denied, sub nom. Skillern v. Texas, 452 U.S. 931, 101 S.Ct.3067, 69 L.Ed.2d 432 (1981); Brooks v. State, 599 S.W.2d 312 (Tex.Crim.App.1979), cert. denied, 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 1036 (1981); Abron v. State, 523 S.W.2d 405 (Tex.Crim.App.1975); Barry v. State, 305 S.W.2d 580 (Tex.Crim.App.) cert, denied, 355 U.S. 851, 78 S.Ct. 71, 2 L.Ed.2d 56 (1957). Nor is it error to deny further examination into an area where there has been no initial response. Leopard v. State, 634 S.W.2d 799 (Tex.App.-Fort Worth 1982, no pet.). Inquiries into juror's political affiliations would also have been improper in this case. Lewis v. State, 488 S.W.2d 740 (Tex.Crim.App.1972) (bookmaking); Johnson v. State, 467 S.W.2d 247 (Tex.Crim.App.), cert. denied, 404 U.S. 951, 92 S.Ct. 273, 30 L.Ed.2d 268 (1971) (malicious

mischief). Further, it would not have been proper to permit detailed, intrusive, and unnecessary voir dire questions regarding prospective juror's political prejudices since appellant's political beliefs were not in issue, and the general subject had been inquired into. Cf. United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.), cert. denied, 439 U.S. 988, 99 S.Ct. 584, 58 L.Ed.2d 661 (1978), (heroin prosecution; alienage was not in issue). The fact that some of defense counsel's questions were proper ones does not make the court's reasonable time limitation unreasonable. Whitaker, at 722.

[10] We find that appellant was afforded a reasonable opportunity to test the partiality of prospective jurors, and that there was no deprivation of the right to make intelligent use of her peremptory strikes. Appellant's first ground of error is overruled.

Appellant's second ground of error challenges the State's in-court identification of her as the person seen committing the offense. She contends she was denied due process by the court's action overruling her motion to suppress identification and permitting the State's

sole witness connecting her with the offense, Bob Price, to identify her at trial. She urges that there was no clear and convincing proof that Price's identification was of independent origin and untainted by an impermissibly suggestive pre-trial photo display.

At appellant's motion hearing, Price testified that he observed appellant writing on the building while he was driving his taxi past at about 3:00 a.m. on April 28, 1981; that he stopped and watched her; that she came over to the cab and asked for a ride; that when he refused she walked behind the cab, put the paint can on the parking lot, and headed toward the intersection. Price said he parked the cab, got out, took her by the arm, and wrestled her back across the street and up the stairs of the Exxon Building. There, a passing private security company guard forced him to release her, after which she fled. He testified that he was face-to-face with appellant for most of the four-minute interval at a distance of eighteen inches or less, and that there was enough illumination around the building for him to see clearly. He denied that photographs of appellant shown to him two

days later had any effect on his identification of her, and swore that his recognition of her was based solely on his opportunity to observe her at the scene.

[11] The State does not dispute appellant's contention that the photo spread shown to the witness Price was impermissibly suggestive. However, even where pretrial identification procedures are impermissibly suggestive, in-court testimony of an identification witness' prior observation of the accused has been held sufficient to serve as an independent basis for the witness' in-court identification. Van Byrd v. State, 605 S.W.2d 265 (Tex.Crim.App.1980). Price's in-court identificati n of appellant was admissible since the record clearly reveals that his prior observation of the appellant was sufficient to serve as an independent origin for the in-court identification. Ground of error two is overruled.

Appellant's third ground of error urges that the court erred in denying her motion for a directed verdict of acquittal because the State failed to prove beyond a reasonable doubt that the

damage to the building caused by the spray-painting exceeded $200.00, as required by Tex.Penal Code Ann.sec.28.03(b)(4)(A) (Vernon 1974). She argues that there is no evidence as to the usual and reasonable cost of repairing the paint damage in Harris County on the date the repairs were made, and that the damage evidence presented is inadequate because it did not show how much of xxon's expense was attributable to the cost of labor spent covering up the message with paper because it was "creating public attention," and how much was attributable to damage caused by the liquid applied by Exxon workers initially, which had the effect of driving the paint deeper into the porous grain of the marble wall.

James Tedford, technical supervisor for the Exxon Building, testified that, among other duties, he oversees the building's repair and cleaning; that he was aware of the costs for repairs to the side of the building from the paint damage; and that the pecuniary loss to Exxon as a result of the painting of the wall was in excess of $200. Appellant's counsel objected to the prosecutor's leading the witness, but

obtained no ruling on the objection. Tedford then testified without objection that it cost $549 to repair the damage. During Tedford's cross-examination, appellant introduced in evidence a written memo prepared by Tedford itemizing the costs of labor and the 150 sheets of sandpaper it took to restore the wall. That exhibit showed $549.23. Tedford testified that this was the total cost for material and labor, at various wage rates, for the workmen whose cumulative 56 hours work (7 men at 8 hours each) was required to remove the spray paint from the building's marble; that there was no other cleanup of dirt or grime that may have gotten on the building before the spray painting; that the work done to the building "wouldn't enhance it; it would de-hance, if anything." To defense counsel's question: "[Y]ou're saying that part of this money could have been spent, if it was spent, with doing something else?", Tedford answered, "No sir, it could not have been." Tedford further testified that the hours included in the itemization were only those related to the removal of the paint, and not for initially covering the painted message.

[12,13] Appellant's complaints about the manner of proof of monetary loss were waived by failure to object at the time the testimony was introduced. Brown v. State, 640 S.W.2d 275, 279 (Tex.Crim.App.1982); Bullard v. State, 533 S.W.2d 812, 815(Tex.Crim.App.1976). There was no evidence the loss was less than $200.00, and there was some evidence, including undisputed evidence introduced by the appellant admitted without objection to show a loss of over $200.00. Bullard, at 815. Such evidence must be viewed in the light most favorable to the verdict. Wilson v. State, 654 S.W.2d 465, 468 (Tex.Crim.App.1983). Ground of error three is overruled.

[14] Appellant's fourth ground of error complains that the trial court erred in excluding testimony of two witnesses regarding her reputation for truth and veracity at the punishment phase of trial. The court did allow each of these witnesses to testify to appellant's reputation as a peaceful and law abiding citizen.

Appellant did not ask to retire the jury so the court could hear the proffered testimony, as provided for in

art.40.09, sec.6(d)(1), Tex.Code Crim.Pro.Ann. (Vernon Supp. 1982-1983). Since the record contains no formal bill of exception as to what the excluded testimony would show, the complaint is not properly before this Court for review. Baldwin v. State, 538 S.W.2d 109, 113 (Tex.Crim.App.1976); Brown v. State, 438 S.W.2d 926, 928 (Tex.Crim.App.1969). Appellant's fourth ground of error is overruled.

[15] By ground of error five, appellant alleges that "material, perjured testimony" was used to return the indictment, and that her conviction is void. She claims that the indictment against her resulted from a probable cause affidavit signed by Officer M.L. Quast of the Houston Police Department Criminal Intelligence Division. Officer Quast stated under oath, as a basis for the arrest warrant, that complaining witness James Tedford, an employee of EXXON, USA, in charge of building repair, told him appellant did not have permission to put paint on the building. At trial, Quast testified that he did not recall ever having spoken to Tedford before trial.

Appellant's argument is without

merit. There is no evidence that Quast testified before the grand jury which returned either the first indictment, later set aside for failure to include the address of the building, or the reindictment. While the record shows that appellant filed a motion to require endorsement of the names of grand jury witnesses on the indictment, it does not indicate that any ruling was obtained by the appellant on that motion. Appellant has not shown there was any perjury by Officer Quast before the grand jury. Further, it was clear from the testimony of Tedford at trial that he did talk to someone at the police department concerning the incident. Appellant's fifth ground of error is overruled.

Appellant's sixth ground of error challenges the court's denial of her motion for mistrial after the prosecution's attempt to impeach her with proof of an extraneous offense.

During direct examination by her own attorney at the guilt or innocence phase, appellant referred to other occasions when she had been arrested and taken to jail. O cross-examination she testified, over objection, that she had been arrested

seven times in the past four to five years; that five of the cases had been dismissed; that she had pleaded no contest to one charge; that she was presently appealing a conviction by a jury; and that none of the charges had ever involved an offense for which incarceration was a potential penalty.

The prosecutor then asked whether it was true that she was arrested for another offense on May 1, 1981, and was served the warrant for the present offense while in jail as a result of the other arrest. Appellant denied such an arrest. There was no objection by appellant's counsel to the question or answer. Later, out of the jury's presence, defense counsel moved for a curative instruction or declaration of mistrial based on the prosecutor's misconduct in asking the question. The request for a curative instruction was denied by the court because of counsel's failure to object. Counsel did not obtain a ruling on his motion for mistrial.

[16-18] Failure to object waives any error in the admission of evidence tending to show an extraneous offense. Smith v. State, 595 S.W.2d 120,

123 (Tex.Crim.App.1980). There was no objection to the prosecutor's question about the extraneous offense until after the prosecutor approached the bench and the court had the jury removed. It is fundamental that a timely objection must be raised at the first opportunity. Atwood v. State, 537 S.W.2d 749, 752 (Tex.Crim.App.1976). A failure to object timely waives any error in the admission of evidence and presents nothing for review. Boulware v. State, 542 S.W.2d 677, 682 (Tex.Crim.App.1976). The objection to the prosecutor's question about the extraneous offense was not timely; the court did not err in denying appellant's requested admonition to the jury.

[19] Appellant's counsel did, however, move for a mistrial at the same time he objected to the question about the extraneous offense. There was no ruling made by the trial court on this motion for mistrial and none was requested by appellant's counsel. Failure to secure an adverse ruling on this motion for mistrial preserves nothing for review. Collection Consultants, Inc. v. State, 556 S.W.2d 787, 794 (Tex.Crim.App.1977).

Appellant's sixth ground of error is overruled.

The Judgement is affirmed.

EVANS, Chief Justice, dissenting.

I agree with the majority that the trial court did not abuse its discretion in controlling the time and general scope of the voir dire examination. However, I believe the trial court did exceed the bounds of its discretion when it refused to permit appellant's counsel to examine prospective jurors about the content of the painted message.

The record shows that the appellant's counsel made an adequate explanation to the trial court of the purpose of his line of questioning, and that notwithstanding such explanation, the trial court, on two separate occasions, prevented him from asking the jury panel whether they would be improperly influenced by the contents of the painted message:

> All right. Now, I think the evidence is also going to show that the painting on the side of the Exxon Building was not just a big blob of paint. I think it's going

to show that the paint was a written message. And the reason I want to ask people this is I want to know what influence the contents of that written message on the side of the Exxon Building would have on your deliberations if your're selected as a juror in this case. I think the evidence is going to show that the -

MR. CARLSON: Objection, Your Honor; going into the facts of the case on voir dire.

THE COURT: Sustained.

MR. VAN SLYKE: Your Honor, could I approach the bench?

THE COURT: Yes, sir.

(Whereupon the following proceedings were had out of the hearing of the jury panel:)

MR. VAN SLYKE: Your Honor, if I could, I think it's necessary for us to briefly ask the jury about their attitude as to what it was that was painted on the side of the Exxon Building. We have every reason to believe that. As a matter of fact, that is one of the theories of our case, Your Honor-that the State's witnesses are biased or prejudiced;

that their testimony against our client will not be truthful; that their motivation for testifying untruthfully will be that they disagree with the content of the political message on the side of the building and they also disagree with the client's political feelings and philosophy. The slogan on the side of the building was a slogan denouncing the red, white and blue flag of the United States and discouraging people to fly the red, white, and blue flag on May Day; that our client is a supporter of the Revolutionary Communist Party; that this is a very sensitive issue that will come out in the evidence. And I think we're entitled to know if the jurors have a bias or prejudice as to the content of the message.

THE COURT: Is that all?

MR. VAN SLYKE: Yes, Your Honor.

MR. CARLSON: May I respond, Your Honor?

THE COURT: Yes, sir.

MR. CARLSON: Ms. Sullivan is not on trial for what she painted on the building but for the fact that she

painted-not the content of what was written there but the fact that she wrote it there in spray paint. I don't see any need to go into, during voir dire, her political affiliations with the jurors, to this point, know nothing about the facts of the case other than it was criminal mischief because of the painting on the side of the building. I don't think it's necessary they know any more than that, because, as I say, Judge, she's being tried for the act of writing and not the content. And I would urge that the Court not allow Mr. Van Slyke to go into her politic l affiliations at this point.

MR. VAN SLYKE: Your Honor, it's my understanding, furthermore, that the State did call Officer Blair as a witness to authenticate a photograph of the slogan, which will be introduced into evidence, and that the photograph will show that the slogan printed on the side of the Exxon Building was, "RED, WHITE, & BLUE--WE SPIT ON YOU! FLY THE RED FLAG MAY 1." And the content of

that photograph could reasonably influence the emotions and opinions of the jurors. And I think we're entitled to know if that photograph and the content of that message would be so highly prejudicial or emotional that a person might not be able to sit in judgment on the case, Your Honor, without having that influence their decision o deliberations as to Ms. Sullivan.

THE COURT: Motion is overruled.

(Whereupon the following proceedings were had in the hearing of the jury panel:)

MR. VAN SLYKE: I think some of the evidence in this case will be a photograph of the painting on the side of the Exxon Building that will depict what was painted on the side of the xxon Building there. Now, if that photograph showed what was painted on the side of the xxon Building-

MR. CARLSON: I would object once again, Your Honor, to going into the facts of the case on voir dire.

THE COUR.: Let's let him finish the question first.

MR. VAN SLYKE: If that photograph

showed what was painted on the side of the Exxon Building was "RED, WHITE & BLUE-WE SPIT ON YOU!"-

MR. CARLSON: Objection, Your Honor.

THE COURT: Mr. Van Slyke, approach the bench.

(Whereupon the following proceedings were had out of the hearing of the jury panel:)

THE COURT: Mr. Van Slyke, I have just ruled on this matter, and I thought you understood my ruling.

MR. VAN SLYKE: Your Honor, I did as to the message but not as to-

THE COURT: I don't want this message given to the jury, and I'm telling you that now. Now, you can do whatever you like as part of pursuing your case, but that's the way it's going to be. And let's not do it.

MR. VAN SLYKE: Your Honor, I do except to the Court's ruling.

THE COURT: All right. You'll object. It's in the record.

The Appellant never contested the fact that the message was painted on the building, and as the State pointed out in its argument, the content of the message had nothing whatsoever to do with

the offense charged. Thus, the only question concerning the text of the message was whether it was of such a nature as to improperly prejudice the prospective jurors against the accused.

In Ransom v. State, 630 S.W.2d 904 (Tex.App.-Amarillo 1982, no pet.) a similar situation was presented. There, on voir dire examination, the trial court permitted the prosecutor to outline some of the prearrest activities of the law enforcement officers, and to ask if any juror would be so offended by such conduct that he or she would find appellant not guilty "regardless of whether or not the state had met its burden." On appeal, the defendant contended that a member of the jury panel was erroneously excused "after the state had improperly committed her to the specific fact situation that existed in this case." 630 S.W.2d 904. Affirming the trial court's judgment, the Court of Appeals concluded that the state's questions did not constitute an improper attempt to commit the juror to a specific set of facts, concluding that the state "was simply attempting to ascertain the jury panel's reaction to the events preceding the arrest." There, as in the instant case, the subject matter of the

inquiry was not an issue in the case, and it related only to the question of whether the jurors would be improperly influenced in their attitude toward the accused and the prosecution.

Thus, there is authority which suggests that if the message in the instant case had been in the nature of a national patriotic slogan, the prosecutor would have been entitled to inquire whether the content of the message would unduly prejudice any prospective juror in favor of the accused. Ranson, supra. On this same rationale, the appellant's counsel in the instant case, should have been permitted to examine the prospective jurors regarding any prejudice they might have because of the content of the message in question.

It seems to me that the circumstances of the case at bar are analogous to those in Abron v. State, 523 S.W.2d 405, 409 (Tex.Crim.App.1975). In that case, the defendant's counsel sought to ask questions of the jury panel as to whether a prospective juror would be prejudiced by the fact that the defendant was black and the complaining witness was a white woman. This inquiry would obviously have assumed the existence of facts,

i.e., the race of the victim, that would normally be developed during the course of trial. Concluding that the trial court abused its discretion in refusing to permit defendant's counsel to make such inquiry of the jury panel, the Court of Criminal Appeals found that the answers to such questions were valuable to the defendant because they could have furnished a basis for the intelligent exercise of his peremptory challenges, and that deprivation of such valid right necessitated a reversal of the case. 523 S.W.2d at 409. In a concurring opinion, Judge Morrison set forth the trial court's stated reasoning for its ruling. The trial court stated that it had instructed defendant's counsel not to predicate his questions with phrases such as "if the evidence should show," thereby setting up different fact situations and asking the jurors to compare them, and whether the jurors would give certain punishment if certain facts were shown to be true. Id. at 409. Thus, the trial court in Abron obviously considered, albeit erroneously, that appellant's inquiry was an attempt to commit the venire to a course of conduct based upon a specific set of facts. In the instant case, the appellant's

counsel quite adequately explained the purpose of his inquiry. As a predicate to his questions, he advised the court that the state had called a witness to authenticate a photograph of the slogan painted on the wall and that he needed to let the prospective jurors know of the content of the slogan in order to determine whether the message itself was so "highly prejudicial or emotional" that one or more of the jurors would not be able to impartially decide the facts as presented at trial.

In my opinion, the appellant was not permitted to examine the jury panel on a matter which would have enabled him to intelligently exercise his peremptory challenges, and the denial of that right requires that we reverse the trial court's judgment and remand the cause for a new trial. Abron v. State, supra.

APPENDIX C

No. 1037-84

IN THE COURT OF CRIMINAL APPEALS

IN AUSTIN

BETTY LYNN SULLIVAN, Petitioner

v.

STATE OF TEXAS, Respondent

May 8, 1985

On this day the Petition for Discretionary Review was refused.

CLINTON, and TEAGUE, dissenting.

APPENDIX D

No. 1037-84

IN THE COURT OF CRIMINAL APPEALS

IN AUSTIN

BETTY LYNN SULLIVAN, Petitioner

v.

STATE OF TEXAS, Respondent

July 10, 1985

On this day the appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

Supreme Court, U.S.
FILED
APR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-859

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1985

BETTY LYNN SULLIVAN,

Petitioner,

V.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ of Certiorari To The Court of Appeals for the First Supreme Judicial District Of Texas

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RESPONDENT'S BRIEF IN OPPOSITION

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11 RP

QUESTION PRESENTED

WHETHER THE TRIAL COURT'S RESTRICTIONS ON VOIR DIRE DENIED PETITIONER THE RIGHT TO EFFECTIVELY EXERCISE HER PEREMPTORY CHALLENGES IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS?

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No. 85-859

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

BETTY LYNN SULLIVAN,

Petitioner,

V.

THE STATE OF TEXAS,

Respondent.

**On Petition For Writ of Certiorari
To The Court of Appeals for the
First Supreme Judicial District Of Texas**

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals for the First Supreme Judicial District of Texas, *Sullivan v. State*, 678 S.W.2d 162 (Tex. Ct. App.-Houston [1st Dist.] 1984), is reproduced as Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals refused the petition for discretionary review on May 8, 1985, *see* Appendix C to the Petition for

Writ of Certiorari, and denied Petitioner's motion for rehearing on July 10, 1985. *See* Appendix D to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under a nonexistent subsection of 28 U.S.C. § 1253. This Court has jurisdiction over Petitioner's claim only under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases her claim upon the sixth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 185th District Court of Harris County, Texas, in Cause No. 338,543, styled *The State of Texas v. Betty Lynn Sullivan.* Petitioner was charged with the offense of felony criminal mischief to which she entered a plea of not guilty. Petitioner was tried by a jury which found her guilty of the offense charged and assessed punishment at two years confinement in the Texas Department of Corrections.

Petitioner's conviction was affirmed by the Court of Appeals for the First Supreme Judicial District of Texas on August 30, 1984. *Sullivan v. State*, 678 S.W.2d 162 (Tex. Ct. App.-Houston [1st Dist.] 1984). The Texas Court of Criminal Appeals refused the petition for discretionary review on May 8, 1985. The same court denied Petitioner's motion for rehearing on July 10, 1985.

B. *Statement of Facts*

The facts relevant to Petitioner's claim are comprehensively set forth in the opinion of the court below. *Sullivan v. State*, 678 S.W.2d 162 (Tex. Ct. App.-Houston [1st Dist.] 1984) (Appendix A to the Petition for Writ of Certiorari).

SUMMARY OF THE ARGUMENT

There is no special or important reason to review this case. The issue presented involves only the application of well settled constitutional principles to the facts involved herein.

The court below determined that the trial court judge's limitations on voir dire by the defense did not deprive Petitioner of any constitutionally protected right. The Court of Appeals found that the trial court's restrictions were reasonable as Petitioner's attorney was afforded a reasonable opportunity to test the partiality of the prospective jurors. The trial court and appellate court below properly applied the correct constitutional standard, although not couched in federal constitutional terms, to Petitioner's particular factual situation. This Court does not sit to review evidentiary determinations based upon settled principles of law. Thus, this Court should decline to exercise its certiorari jurisdiction in this case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case, and none exist.

II.

REVIEW SHOULD BE DENIED SINCE THE QUESTION RAISED CONCERNING THE TRIAL COURT'S LIMITATIONS ON JURY VOIR DIRE INVOLVES ONLY MATTERS OF ESTABLISHED FEDERAL CONSTITUTIONAL STANDARDS.

The Petition for Writ of Certiorari does not raise unsettled questions of law. The issue addressed involves nothing more

than evidentiary questions and factual determinations made by the state trial and appellate courts and their application of well settled principles of constitutional law in deciding adversely to Petitioner.

In *Irvin v. Dowd*, 366 U.S. 721 (1961), this Court held that the constitutional standard of fairness requires "a panel of impartial, indifferent jurors." *Id.* at 722.

> It is not required, however, that the jurors be totally ignorant of facts and issues involved . . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722-23. The Court noted, however, that despite a juror's assurances to the contrary, if a final, preconceived opinion has been formed he or she would be incompetent. *Id.* The burden is on the Petitioner to show "the actual existence of such an opinion in the mind of the juror . . . ." *Id. quoting Reynolds v. United States*, 98 U.S. 145, 156 (1879). There is no constitutional presumption of bias or prejudice and while a member of an unpopular minority group must be awarded the solicitude which properly accompanies a criminal defendant, she is not entitled to unusual protection or exception. *See Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981); *Dennis v. United States*, 339 U.S. 162, 168 (1950).

Voir dire is conducted under the supervision of the trial judge who has broad discretion as to the questions to be asked. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); *Ristaino v. Ross*, 424 U.S. 589, 594 (1976). The determination of impartiality of prospective jurors, in which demeanor plays an especially important part, is particularly within the province of the trial judge. *Ristaino v. Ross*, 424 U.S. at 595. The trial court has a serious duty to ascertain whether a prospective juror is actually biased against the accused, and a broad discretion in its rulings or challenges therefor. *Dennis v. United States*, 339 U.S.

at 168. Further, "[t]he finding of the trial court upon that issue ought not be set aside by a reviewing court, unless the error is manifest." *Id.* These principles were recently affirmed in *Patton v. Yount*, _____U.S._____, 104 S.Ct. 2885 (1984); *see also Wainwright v. Witt*, _____U.S._____, 105 S.Ct. 844 (1985).

The standard for voir dire applied by the court below, although not couched in federal constitutional terms, parallels the federal standard. The court below carefully reviewed the record of the voir dire examination and found that Petitioner had failed to demonstrate reversible error as Petitioner was afforded a reasonable opportunity to test the partiality of prospective jurors. *Sullivan v. State*, 678 S.W.2d at 167. The trial judge advised both sides before voir dire began that each side had forty-five minutes for voir dire. *Id.* at 165. Petitioner's attorney made no objection to this time limitation. *Id.* The court below found that Petitioner's attorney spent an inordinate amount of time on general principles of law and the presumption of innocence. *Id.* at 166. Her attorney attempted twice to inform the jury panel of the contents of the message spray-painted on the Exxon building in order to determine whether any juror would be influenced by its political implications. *Id.* at 165. He also attempted to question the veniremen as to whether testimony by a police officer concerning prior dealings with Petitioner in connection with her activities as a communist supporter would affect anyone's ability to remain impartial. *Id.* The State's objections to both lines of questioning were sustained. *Id.* Although the defense was given three additional minutes of voir dire, at the end of voir dire, Petitioner's attorney dictated a bill of exceptions consisting of thirty questions he would have asked the jury panel. *Id.*

The court below held that these restrictions on voir dire by the trial court were within its sound discretion as the questions not permitted were essentially restatements of the question whether Petitioner's support of the Revolutionary Communist Party would influence the deliberations. *Id.* at 166. The court below found that some of the proposed questions would have been proper and that other questions, such as inquiries into jurors' political affiliations and political prejudices, would have been improper. *Id.* at 167. Finally, the court below found that Petitioner's attorney's general inquiry as to prejudice

against Petitioner's political activities which had received no juror response was sufficient to test the partiality of prospective jurors. *Id.*

Petitioner asks this Court to do nothing more than test the evidentiary sufficiency in her particular case applying well settled federal constitutional standards. This Court sits to decide important, novel or recurring questions. Petitioner's claim does not justify the exercise of this Court's certiorari jurisdiction. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For these reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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